DATE ISSUED: JUL 12 1994

In the Matters of:

ZERA FARMS,
Employer

CASE NOS.: 94-TLC-4
94-TLC-5

Before: JOHN M. VITTONE
Deputy Chief Judge

DECISION AND ORDER

This is an expedited administrative review requested Employer, Zera Farms, of a denial of two applications for temporary alien agricultural labor certifications by the U.S. Department of Labor Regional Administrator (RA).[1] These cases arise under the Immigration and Nationality Act at 8 U.S.C. § 1101 et seq. (Act), as amended by the Immigration Reform and Control Act of 1986 and the regulations promulgated thereunder at 20 C.F.R. §§ 655.90-655.113. Twenty C.F.R. § 655.112(a) (2) provides that this Decision and Order shall be issued within five working days after receipt of the case file and shall be the final decision of the Secretary. The case file was received in this office on July 6, 1994. Accordingly, the Decision and Order is being issued by July 13, 1994.

Under the Act, an employer must certify to the Secretary of Labor that the employment of aliens in seasonal or temporary positions will not have an adverse effect on the wages and working conditions of United States workers and that there are insufficient United States workers who are willing, able and qualified for the job. 8 U.S.C. § 1188(a) (1).

PROCEDURAL HISTORY

This matter involves two appeals filed by Employer following the RA's denial for H-2A temporary alien agricultural labor certifications. The first, captioned as 94-TLC-4, involves the RA's June 22, 1994 denial for four H-2A certifications.[2] The second, captioned as 94-TLC-5, involves the RA's June 22, 1994 determination that one of six H-2A certification requests should

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[1] Employer has appealed ETA case numbers 1265 and 1266.

[2] ETA case number 1265.

be granted.[3] On June 27, 1994, Employer requested an expedited administrative review of both determinations by an administrative law judge.

SCOPE OF REVIEW

Twenty C.F.R. § 655(a) governs the procedures and authority of an administrative law judge for expedited administrative review of H-2A applications. Under the regulations, an administrative law judge (or a panel of judges) shall review the record "for legal sufficiency" and issue a decision within five working days after receipt of the Appeal File. Additionally, "[t]he administrative law judge shall not remand the case and shall not receive additional evidence." 20 C.F.R. § 655.112(a). As a result, evidence submitted by the Department of Labor and the Employer, which was not considered by the RA, cannot be considered on review.[4]

STATEMENT OF THE CASES

As this decision reviews two separate determinations by the RA, each will be reviewed separately.

I. ETA Case Number 1265; 94-TLC-4

On May 3, 1994, Employer filed an ETA-750 application seeking to fill the positions of four farm workers. Appeal File (AF) 10-11. The job duties are as follows:

> Hoeing around plants to remove weeds, harvesting tobacco by cutting the entire plant using a hatchet or knife and placing the entire stalk on spear, hang tobacco in barns for curing, take down tobacco and strip leaves from plant. Prepare tobacco for shipping. May make minor repairs to equipment and farm buildings. Also, will grade and prepare tobacco for shipping.

AF 10. The position requires a 42 hour work week from 10:00 a.m. to 6:00 p.m. at $5.97 per hour. The term of employment is from July 12, 1994 through December 17, 1994. AF 11.

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[3] ETA case number 1266.

[4] On Friday, July 8, 1994, the undersign's office contacted the parties to determine whether any circumstances concerning these appeals had changed which would obviate the need for an administrative determination. Employer requested that it be afforded the opportunity to submit a written statement. The Department of Labor, after being notified of Employer's request, requested that it be allowed to submit a statement of position. Both statements were received in this office on July 11, 1994. As no new circumstances have arisen which would change the need to decide this case, the undersigned must issue a decision based solely on the record received from the RA. See 20 C.F.R. § 655.112(a) (1). Therefore, any new evidence presented by the parties cannot be considered in this decision.

By letter dated May 11, 1994, the RA advised Employer that its application was acceptable for consideration because it contained conditions of employment which would not adversely affect United States workers similarly employed. The RA also determined that the positive recruitment Plan was acceptable. AF 8. By letter dated May 20, 1994, Employer submitted its recruitment results, notifying the RA that recruitment efforts were of no avail. AF 7.

By notice dated June 22, 1994, the RA denied Employer's request for four temporary alien labor certifications. AF 3.

II. ETA Case Number 1266; 94-TLC-5

On May 3, 1994, Employer filed a second ETA-750 application seeking to fill the positions of six farm workers. AF 5-6. The job duties are as follows:

> Hoeing around plants to remove weeds, harvesting tobacco by cutting the entire plant using a hatchet or knife and placing the entire stalk on spear, hang tobacco in barns for curing, take down tobacco and strip leaves from plant. Prepare tobacco for shipping. May make minor repairs to equipment and farm buildings. Also, will grade and prepare tobacco for shipping.

AF 5. The position requires a 42 hour work week from 10:00 a.m. to 6:00 p.m. at $5.97 per hour. The term of employment is from July 12, 1994 through September 20, 1994. AF 6.

By letter dated May 11, 1994, the RA advised Employer that its application was acceptable for consideration because it contained conditions of employment which would not adversely affect United States workers similarly employed. The RA also determined that the positive recruitment plan was acceptable. AF 11. By letter dated May 20, 1994, Employer submitted its recruitment results, notifying the RA that recruitment efforts were of no avail. AF 10.

By notice dated June 22, 1994, the RA denied Employer's request for five of the six temporary alien labor certifications. AF 3.

DISCUSSION

I. ETA Case Number 1265; 94-TLC-4

In support of its denial of H-2A temporary labor certification for four job opportunities, the RA determined that a sufficient number of able, willing and qualified United States workers were identified as being available at the time and place needed to fill all of the job opportunities for which the certification was requested. See 20 C.F.R. § 655.106(b) (1) (i). The RA filed Attachment #l with its determination which shows the number of job opportunities denied by

Employer, the crop and/or activity and the periods covered by the denial.[5] The RA states that it was unable to determine and to certify that the employment of H-2A temporary alien agricultural workers in such labor or services would not adversely affect the wages and working conditions of United States workers similarly employed.

Employer, in response to the RA's determination, simply stated that it was unable to find qualified United States workers to compete the jobs for which H-2A applications were filed. Specifically, Employer states in its request for administrative review that it was:

> Unable to find qualified U.S. workers. Will interview people in Puerto Rico 6/29/94. We will hire qualified workers if I could find people able to do the work and get the job done. Certainly it would be less expensive than housing workers and paying airline tickets.

Employer, however, has not timely filed any arguments to either rebut the RA's determination or show that the workers listed were not able, willing, qualified and available for the job opportunities in question. As previously stated, the undersigned, in accordance with 20 C.F.R. § 655.112(a) (1), cannot accept further evidence beyond that provided in the Administrative File. Hence, any results from Employer's trip to Puerto Rico cannot be considered in this decision.[6]

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[5] Attachment #l identified the following jobs denied:

Employer Information

Number of Workers Identified as Being Available: 4

Area of Employment: Connecticut

Crop and/or Activity: Farmworker Field Crop II (Tobacco)

Period Covered by Denial: 7/12/94-12/17/94

Names	SSN	No. Jobs

[5 USC 552(a)(2)(E) redaction notice: The social security numbers below have been redacted.]

Jorge Luyando	xxx-xx-xxxx	1
Rafael Delgado	xxx-xx-xxxx	1
Daniel Prado	xxx-xx-xxxx	1
Juan Figuero	xxx-xx-xxxx	1

[6] The undersigned notes that Employer was notified by the RA in his determination that, "The request for review or a hearing should contain any legal arguments which you believe

(continued...)

The undersigned takes note of Employer's good faith attempts to find qualified United States workers for the jobs at issue in this case. Employer's trip to Puerto Rico is evidence of such good faith attempts. However, the undersigned is bound by the record contained in the Administrative File and must make a determination based on that record. Therefore, since no arguments were presented by Employer to rebut the findings of the RA, and since the RA's determination is legally sufficient, the undersigned must affirm the findings of the RA in this case.

Employer is reminded that it can request a new determination from the RA pursuant to 20 C.F.R. § 655.106(h)(1).[7]

II. ETA Case Number 1266; 94-TLC-5

The RA's determination in ETA Case Number 1266 is based on the same reasons set forth in the previously discussed case; Namely, that a sufficient number of able, willing and qualified United States workers have been identified as being able at the time and place needed to fill five of the six job opportunities for which certification has been requested. 20 C.F.R. § 655.106(b)(1).[8]

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[6](...continued)
will rebut the basis of denying the request for certification." See 20 C.F.R. § 655.104(c) (3).

[7] Twenty C.F.R. 655.106(h) (1) reads, in relevant part:

> If a temporary alien agricultural labor certification application has been denied (in whole or in part1 based on the RA's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able willing, qualified, or available at the time and place needed, the employer may request a temporary alien agricultural labor certification determination from the RA.

[8] The RA listed the following United States workers in its determination:

Certification Denied:

A. Number of Job Opportunities Denied: 5

B. Activity: Farmworker Field Crop II

C. Period Covered by Denial: 7/12/94-9/20/94

(continued...)

Since Employer filed the identical appeal for both cases the RA's determination in this case must be affirmed based on the reasons set forth in the previous case. (ETA Case Number 1265; 94-TLC-4). Again, Employer is reminded that it can request a new determination from the RA pursuant to section 655.106(h) (1).

ORDER

Based on the foregoing, the Regional Administrator's denial of nine out of ten of the temporary agricultural labor applications for these two cases is affirmed.

JOHN M. VITTONE
Deputy Chief Judge

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[8](...continued)

Names	SSN	No. Jobs

[5 USC 552(a)(2)(E) redaction notice: The social security numbers below have been redacted.]

Pedro Luyendo	xxx-xx-xxxx	1
Rene Ruiz	xxx-xx-xxxx	1
Gabriel Molina	xxx-xx-xxxx	1
Victor Arroya	xxx-xx-xxxx	1
Domingo Montes	xxx-xx-xxxx	1